No. 85-6725

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOHN BOURJAILY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In order to admit a co-conspirator declaration against a defendant under Fed. R. Evid. 801(d)(2)(E), the court must find (1) that a conspiracy existed, (2) that the declarant and the defendant were members of the conspiracy, and (3) that the declaration was made in the course of and in furtherance of the conspiracy. This case presents the following questions:

1. Whether, in determining if the conspiracy existed and if the defendant and the declarant were members of the conspiracy, the court may consider the declaration itself or must base its determination solely on independent evidence;

2. What quantum of proof is necessary to support the findings the court must make under Rule 801(d)(2)(E); and

3. Whether the Confrontation Clause of the Sixth Amendment requires a court, before admitting a co-conspirator declaration, to make a separate determination that the declaration is reliable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 781 F.2d 539.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1986. On March 10, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to April 15, 1986. The petition was filed on April 15, 1986, and was granted on October 14, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 104 of the Federal Rules of Evidence provides, in pertinent part, as follows:

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

> In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 801 of the Federal Rules of Evidence provides, in pertinent part, as follows:

> (d) *Statements which are not hearsay*. A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 15 years' imprisonment and to a three-year special parole term on the substantive count. The court of appeals affirmed (Pet. App. A1-A7).

1. The evidence at trial showed that during the second week of May 1984, FBI informant Clarence Greathouse made arrangements to transfer one kilogram of cocaine to petitioner's co-defendant, Angelo Lonardo.[1] According to their agreement, Lonardo was to select people to distribute the cocaine. On May 12, 1984, Greathouse met with Lonardo to discuss the cocaine sale. In the ensuing conversation, which Greathouse tape-recorded on a body recorder, Lonardo said that he had talked to "the people" and that they were "interested." Greathouse asked whether Lonardo's "people" would be willing to pay for the cocaine "up front" or whether they preferred "to wait till it's here."

[1] Lonardo was convicted together with petitioner, but he did not appeal from his conviction.

Lonardo replied that they would handle the transaction as they had in the past. He stated that his contacts did not know that Greathouse was his supplier, and he added that he wanted to keep it that way. Greathouse demanded one half of the purchase price before delivery, and he requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed and said that he would let Greathouse know where the cocaine sale would take place. Pet. App. A3; J.A. 13, 88-89, 99-101; Tr. 10-19, 21, 24-26, 33; GX 1C.

On May 17, Greathouse told Lonardo that "nothing [had] matured" yet, but that he "planned * * * a flight" three days from then, and that "everything is set on that end" (J.A. 117; GX 3B). Greathouse said that he needed some money to take with him and that "everything else will be fronted to me" (J.A. 118; GX 3B). Lonardo responded that he would "work on it" and "see what [he could] do" (*ibid.*). On May 19, Lonardo called Greathouse on his paging beeper; when Greathouse returned the call, Lonardo advised Greathouse that he had some money for him, and he told Greathouse to come pick it up. Shortly after the call, Greathouse met Lonardo at a Cleveland restaurant, and Lonardo gave him $1,000. Pet. App. A3; J.A. 121-122; Tr. 39, 43-46, 49-54; GX 5B.

Greathouse and Lonardo had several more conversations about the cocaine transaction during the following week. On May 24, Greathouse met with Lonardo and told him that the cocaine had arrived. Lonardo said that he would recontact the prospective buyers, but he explained that he had told his confederates that the deal was off because of a misunderstanding about the purchase price. Pet. App. A3; J.A. 133-135; Tr. 68-84; GXs 7B, 9B, 10B, 11B.

In a tape-recorded telephone conversation on May 25, Lonardo told Greathouse that he had a "gentleman friend" with him who "had some questions" to ask Greathouse

about "the trees"—a code word referring to the cocaine. Lonardo indicated that he wanted Greathouse to call back immediately. J.A. 137; Tr. 83-86, 87; GX 12B. The second call was not recorded, but an FBI agent who was with Greathouse at the time listened to both sides of the conversation. In the course of that call, Greathouse spoke directly with Lonardo's "gentleman friend." J.A. 23-25, 37-38; Tr. 103-105, 753-755. The two discussed the quality of the cocaine and how the payment for the cocaine would be made. Lonardo's "friend" told Greathouse that he would pay $15,000 "up front" and the balance of the $31,000 purchase price after the cocaine was tested. J.A. 24; Tr. 104.

After speaking with Lonardo's "friend," Greathouse once again spoke with Lonardo to arrange for the delivery of the cocaine. J.A. 25-26, 138-140; Tr. 110-111; GX 13B. Lonardo told Greathouse to bring the cocaine to the Hilton Hotel on Rockside Road in Cleveland and to park his car behind the hotel. Lonardo said he would be waiting in the lobby, and that Greenhouse was to bring him the keys to the car. Lonardo said that his "friend" would be "out in his car" and that after receiving Greathouse's keys Lonardo would "just go over and you know." Pet. App. A3; J.A. 30, 139-140; GX 13B.

Thereafter, FBI agents placed four quarter-kilogram bags of cocaine in Greathouse's car and had him drive to the Hilton Hotel. At the time that had been arranged for the transaction, petitioner was seen sitting in a car in the hotel parking lot. He was facing away from the hotel and was parked in an area apart from the other parked cars. Petitioner was subsequently observed driving around the parking lot, examining the parked cars. Pet. App. A3-A4.

When Greathouse arrived, he entered the Hilton and gave Lonardo the keys to his car. Lonardo walked to Greathouse's car, circled it, and then walked to petitioner's car, where he spoke with petitioner. Lonardo then walked back to Greathouse's car and removed the cocaine. As

Lonardo approached Greathouse's car, petitioner turned his car around and drove it to a point within two or three parking spaces of Greathouse's car. Lonardo took the cocaine from Greathouse's car, carried it to petitioner's car, and handed it to petitioner. At that point, the agents arrested petitioner and Lonardo and recovered the cocaine from petitioner's car. Inside a leather bag that was secreted under the passenger seat of petitioner's car, the agents found $19,000 in cash, together with a receipt bearing petitioner's name. The agents found an additional $2,000 in $100 bills in the glove compartment, along with petitioner's driver's license. On petitioner's person, the agents found a paging beeper. Pet. App. A4; J.A. 27-30, 41-46, 53, 56-62; Tr. 113-121, 767-779, 807, 877-893.

At the conclusion of the government's case in chief, the district court addressed the question of the admissibility of Lonardo's out-of-court statements against petitioner. J.A. 66-75; Tr. 973-989. The court found that the government had established by a preponderance of the evidence that a conspiracy existed, that Lonardo and petitioner were members of the conspiracy, and that Lonardo's out-of-court statements had been made in the course of and in furtherance of the conspiracy. J.A. 75; Tr. 989.

2. The court of appeals affirmed (Pet. App. A1-A7). It held, first, that the statements Lonardo made to Greathouse had been properly admitted against petitioner as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) (Pet. App. A4). The court upheld the district court's findings that the government had satisifed the requirements of Rule 801(d)(2)(E) by showing, by a preponderance of the evidence, that a conspiracy existed, that Lonardo and petitioner were members of it, and that Lonardo's statements were made during the course of and in furtherance of the conspiracy. As evidence that Lonardo and petitioner were co-conspirators, the court of

appeals relied both on Lonardo's statements to Greathouse and on petitioner's actions in the hotel parking lot on the evening that he received the cocaine (Pet. App. A4-A5). Finally, the court held (*id.* at A5-A6) that because Lonardo's statements satisfied the requirements of Rule 801(d)(2)(E)—which the court of appeals determined to be a " 'firmly rooted hearsay exception' " (Pet. App. A5, quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980))—the admission of those statements against petitioner did not violate petitioner's rights under the Confrontation Clause.

SUMMARY OF ARGUMENT

I. It is well settled that before admitting a co-conspirator declaration against a defendant under Rule 801(d)(2)(E), the trial court must first find that a conspiracy existed and that the declarant and the defendant were members of the conspiracy. The first issue presented in this case is whether the trial court must make that decision based solely on evidence independent of the statement itself. In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court held that co-conspirator statements are admissible against a defendant "only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." 315 U.S. at 74-75 (citations omitted).

The rule against "bootstrapping" originated in an evidentiary system that assigned to juries—and not courts—the task of deciding the admissibility of co-conspirator declarations. Under Rule 104(a) of the Federal Rules of Evidence, however, the admissibility decision is now clearly committed to the court. Accordingly, there is no continuing need for a prophylactic rule of the sort that barred jurors from considering the co-conspirator statement itself while they were deciding its admissibility. Indeed, Rule 104(a) specifically authorizes the trial judge, in making decisions on the admission of evidence, to consider all relevant, non-privileged evidence bearing on the factual and legal questions that the court must address. To be sure, statements made by a co-conspirator regarding the existence and composition of a conspiracy may, in particular cases, be less probative than other evidence bearing on those issues. But that is a matter that a district court can properly assess in weighing all the relevant evidence. It is not a reason to skew the fact-finding process by disabling the court from giving any consideration to the co-conspirator declaration, no matter how compelling it may be as evidence of the existence and composition of a conspiracy in a particular case.

Even if the Court concludes that the "bootstrapping" rule should be preserved, the Court should make clear that the rule does not prohibit the district court from considering the co-conspirator declarations at all, but only from considering the hearsay portions of those declarations. That is, if a particular co-conspirator declaration is not an assertion offered to prove the truth of the matter asserted, or if the declaration is admissible under some other exemption from or exception to the rule against hearsay, the district court should be free to consider the declaration in determining whether the remaining, hearsay portions of the declaration should be admitted. In this case, for example, most of Lonardo's declarations are either not assertions at all, or are statements of his intentions with regard to future acts, which would be admissible under the "state of mind" exception to the hearsay rule, Fed. R. Evid. 803(3). Even if this Court decides to preserve the "bootstrapping" rule, the district court could properly consider those portions of Lonardo's declarations in determining whether Lonardo and petitioner were co-conspirators. And taking those portions of Lonardo's declarations into account, there can be no doubt that the district court's ruling on that issue was correct.

II. The second issue presented in this case concerns the standard of proof that a district court should apply in ruling on the admissibility of co-conspirator statements. We agree with petitioner that "preponderance of the evidence" is the proper standard. This Court has repeatedly applied the preponderance standard in deciding questions of admissibility in analogous contexts, and the rationale for using the preponderance standard in those cases applies equally here.

III. The third question presented in this case is whether the Confrontation Clause requires a trial court to conduct a separate inquiry into the reliability of a co-conspirator declaration, even after the declaration has been found admissible under Fed. R. Evid. 801(d)(2)(E). We believe that no such inquiry is required. The co-conspirator declaration rule, embodied in Rule 801(d)(2)(E), is a "firmly rooted" exception to the rule against hearsay; under this Court's decisions, statements embraced by that exception are therefore sufficiently reliable to satisfy Confrontation Clause concerns. The prerequisites to admissibility contained in Rule 801(d)(2)(E) already ensure that statements admitted under the rule will be sufficiently reliable to justify their submission to the jury. A separate reliability inquiry would prove burdensome on trial and appellate courts without significantly promoting the purposes served by the Confrontation Clause.

ARGUMENT

I. A TRIAL COURT IS NOT CONFINED TO THE "INDEPENDENT EVIDENCE" IN DECIDING WHETHER A CO-CONSPIRATOR DECLARATION IS ADMISSIBLE.

In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court stated that co-conspirator statements are admissible against a defendant "only if there is proof *aliunde* that [the defendant] is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level

of competent evidence." 315 U.S. at 74-75.[2] Relying on *Glasser*, a majority of the courts of appeals have held that in deciding whether a declarant and defendants are co-conspirators—the inquiry required by Fed. R. Evid. 801(d)(2)(E)—a trial court may consider only the evidence independent of the co-conspirator statement itself.[3]

The first question presented in this case is whether the "bootstrapping rule" has any continuing vitality in light of Rule 104(a) of the Federal Rules of Evidence. Rule 104(a) provides that courts, not juries, are to make determinations of admissibility, and that in making those determinations, courts are not bound by the rules of evidence, except for those relating to privilege. We submit that the bootstrapping rule was the product of a system in which the task of determining the admissibility of co-conspirator declarations was given to juries, and that the rule cannot be justified in a system in which that task is given to the court.

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[2] The Court also alluded to the rule against "bootstrapping" in *United States* v. *Nixon*, 418 U.S. 683 (1974), where the Court stated, in passing, that before the declarations of one conspirator may be admitted against another there must be "a sufficient showing, by independent evidence," of a conspiracy involving both the declarant and the defendant against whom the declaration is offered. 418 U.S. at 701 & n.14.

[3] See, *e.g.*, *United States* v. *DeJesus*, 806 F.2d 31, 34 (2d Cir. 1986); *In re Japanese Electronic Products Antitrust Litig.*, 723 F.2d 238, 261 (3d Cir. 1983), rev'd on other grounds *sub nom*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986); *United States* v. *Monaco*, 702 F.2d 860, 876 (11th Cir. 1983); *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349, (9th Cir. 1981); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *Jackson*, 627 F.2d 1198, 1215-1216 n.34 (D.C. Cir. 1980); *United States* v. *James*, 590 F.2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128, 1133 n.11 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

1. The reason for the bootstrapping rule is not easy to discern. The *Glasser* opinion merely recited the rule, without suggesting any justification for it. From the early authorities that have been cited in support of the rule, however, it appears to have been based, at least in part, on the allocation to juries of the responsibility for deciding whether to admit co-conspirator declarations.

At the time the bootstrapping rule developed, the task of determining the admissibility of co-conspirator declarations was routinely assigned to juries, not to judges. Thus, juries were typically instructed that in order to consider co-conspirator declarations against a defendant, the jury—not the trial court—would first have to decide whether the declarant was part of the conspiracy with the defendant. Because juries were not permitted to consider incompetent evidence, the courts instructed the jurors that they had to make the finding of conspiracy before they could consider the co-conspirator declarations. Only after the jury found, from competent non-hearsay evidence, that the defendant and the declarant were members of the conspiracy would the co-conspirator declarations in turn become competent evidence that could be considered against the defendant for other purposes. The courts summarized this point by instructing juries that they had to make the finding of conspiracy based on evidence independent of the co-conspirator declarations. See *Hauger* v. *United States,* 173 F. 54, 57 (4th Cir. 1909); *United States* v. *Richards,* 149 F. 443, 452-453 (D. Neb. 1906); *United States* v. *Goldberg*, 25 F.Cas. 1342, 1347 (E.D. Wis. 1876) (No. 15,223); *United States* v. *McKee*, 26 F.Cas. 1107, 1110 (E.D. Mo. 1876) (No. 15,686).[4]

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[4] Pattern jury instructions throughout much of this century ordinarily included a charge that told the jury that it could consider co-conspirator statements only after it had determined that the charge of conspiracy had been proved. See, *e.g.*, 5 A. Reid, *The Law of Instructions to Juries* § 3336, at 88-90 (3d ed. 1962); 2 H. Randall, *A Treatise on the Law of Instructions to Juries* § 1812(3), at 2079 (1922). The *Glasser* case itself was submitted to this Court on the theory that the jury had the final word on the admissibility of co-conspirator statements. See Brief for the United States, at 61 n.6, *Glasser* v. *United States*, 315 U.S. 60 (1942).

The practice of leaving to the jury the final decision whether to admit a co-conspirator statement into evidence persisted until the enactment in 1975 of the Federal Rules of Evidence. Indeed, as late as its 1977 edition, the leading treatise on federal jury instructions continued to recommend a charge instructing the jury that it could consider co-conspirator statements against someone other than the declarant only if it first found beyond a reasonable doubt that a conspiracy had been proved. See 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 27.06, at 13 (3d ed. 1977). This Court's 1974 decision in *Anderson* v. *United States*, 417 U.S. 211, involved just such a jury instruction (417 U.S. at 221), and the circuit courts routinely endorsed that instruction as well. See, *e.g.*, *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Apollo*, 476 F.2d 156 (5th Cir. 1973); see also 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104[05], at 104-40 & n.9 (1986).

In this historical context, the bootstrapping rule is easily understood as an exclusionary device intended to ensure that juries would not rely on incompetent evidence in making the admissibility decision. See *United States* v. *Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *Petrozziello*, 548 F.2d 20, 22-23 & n.2 (1st Cir. 1977); *United States* v. *James*, 590 F.2d 575, 587 (5th Cir.) (en banc), (Tjoflat, J., concurring specially) cert. denied, 442 U.S. 917 (1979). As long as juries decided the admissibility of co-conspirator statements, there was a logical basis to apply a rule that confined the scope of their decisionmaking authority.

2. Rule 104(a) of the Federal Rules of Evidence has now abolished the evidentiary system in which the bootstrapping rule arose. Under Rule 104(a), the decision whether to admit evidence is vested exclusively in the trial court. In making that decision, moreover, the rule explicitly authorizes the court to consider all relevant, non-privileged evidence.[5]

By enacting Rule 104(a), Congress swept aside the technical exclusionary rules of evidence, which were unsuited to the judicial function. The language Congress chose to express its intention was broad and unambiguous. The plain terms of Rule 104(a) state that in making admissibility decisions the trial judge "is not bound by the rules of evidence" except for those relating to privilege.[6] Privileged material is the *only* evidence that is off-limits. No other exceptions—such as the rule forbidding the consideration of "bootstrapped" evidence—are listed. Under Rule 104(a) there is thus no reason for a trial judge to refrain from considering a co-conspirator statement in deciding the preliminary question of admissibility under

[5] Petitioner (Pet. 10-11) and most courts and commentators agree that the adoption of Rule 104(a) had the effect of discarding the system under which the jury was given the last word on the admissibility of co-conspirator statements. See *United States* v. *James*, 590 F.2d 575, 579-580 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977); accord 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104[05], at 104-39 to 104-40 (1986); 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331-332 (1980); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 735 (4th ed. 1986); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 261 (3d Cir. 1983), rev'd on other grounds, No. 83-2004 (Mar. 26, 1986).

[6] Fed. R. Evid. 1101(d)(1) restates the point, providing that the rules (other than those with respect to privileges) do not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104."

Rule 801(d)(2)(E). Accord Bergman, *The Coconspirators' Exception: Defining The Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 Hofstra L. Rev. 99, 105-106 (1976).

This reading of the plain terms of Rule 104(a) is confirmed by the accompanying notes of the Advisory Committee.[7] The Advisory Committee made clear that under Rule 104(a) the trial judge is free to rely on any relevant, non-privileged material in making admissibility decisions. The exclusionary rules of evidence, the Advisory Committee stated, do not limit the judge in determining whether evidence should be admitted (Fed. R. Evid. 104(a) advisory committee note, 28 U.S.C. App. at 681):

> If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n.8, points out that the authorities are "scattered and inconclusive," and observes:
>
> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the

[7] This Court has frequently relied on Advisory Committee Notes in deciding the appropriate construction of rules of evidence or procedure. See, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 15 n.12. (1985); *United States* v. *Abel*, 469 U.S. 45, 51 (1984); *Barefoot* v. *Estelle*, 463 U.S. 880, 905 n.9 (1983); *United States* v. *Frady*, 456 U.S. 152, 163 n.13 (1982); *Delta Air Lines* v. *August*, 450 U.S. 346, 352 n.8, 356-360 (1981). Deference to the Advisory Committee on the Rules of Evidence is particularly appropriate because, as the Reporter for the Advisory Committee has noted, the Notes "were carefully scrutinized by the involved congressional committees and subcommittees, and, except in those instances where superseding changes were made in the Rules by the Congress, must be taken to represent the thinking of that body as the equivalent of a committee report effectively serving as the basis of legislation." Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 913 (1978).

view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

The Advisory Committee specifically noted that the trial judge would often need to consider otherwise hearsay portions of a statement in determining the statement's admissibility (*ibid.*):

> An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest.[8]

This court considered the implications of Rule 104(a) in *United States* v. *Matlock*, 415 U.S. 164 (1974), and concluded that trial judges are not bound by the rules of evidence in deciding whether to admit evidence. The issue in *Matlock* was whether the police had obtained lawful consent to search the defendant's premises from Mrs. Graff, the woman with whom defendant lived. At a hearing, the government offered evidence, chiefly the hearsay declarations of Mrs. Graff, that Mrs. Graff and the defendant jointly occupied the premises. The district court held that those hearsay statements were not admissible to prove that Mrs. Graff had the authority to consent to the search. 415 U.S. at 167-169.

This Court reversed. The Court noted, first, that the rules of evidence normally applicable in criminal trials "do not operate with full force at hearings before the judge to determine the admissibility of evidence." 415 U.S. at 172-173 (footnote omitted). That principle, the Court observed, was confirmed by Rule 104(a) of the Federal Rules of Evidence, which at that time had been transmitted to Congress but had not been enacted.[9] The Court cited with approval the view that when the judge is considering the admissibility of evidence, the exclusionary rules—other than the rules of privilege—should not be applicable. In that setting, "the judge should receive the evidence and give it such weight as his judgment and experience counsel." 415 U.S. at 175.[10]

Applying those principles, the Court determined that Mrs. Graff's statements were sufficiently reliable to be considered as evidence of her authority to consent to the search. The Court observed that there was no question that the statements had been made and nothing in the record to suggest that the statements were untrue. 415 U.S. at 175. The statements "were consistent with one another" and were "corroborated by other evidence received at the suppression hearings." *Id.* at 176. Moreover,

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[8] Chief Judge Weinstein, a member of the Advisory Committee, has written that under Rule 104(a) courts can "consider hearsay, including the very statement in question, in determining whether the * * * criteria for admissibility have been met," but he notes that "the courts have been reluctant to acknowledge this power." 1 J. Weinstein & M. Berger, *supra*, ¶ 104[05], at 104-44. Professor Cleary has taken a contrary view, but on the ground that Rule 104(b), and not 104(a), governs the admissibility of co-conspirator statements. See Cleary, *supra*, 57 Neb. L. Rev. at 918. That position has been uniformly rejected by the commentators, see, *e.g.*, 1 D. Louisell & C. Mueller, *supra*, § 29, at 208 & n.92; S. Saltzburg & K. Redden, *supra*, at 735, as well as by the courts—including those courts that maintain the rule against bootstrapping. See, *e.g.*, *United States* v. *James*, 590 F.2d at 579-580; *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 261. In any event, Professor Cleary apparently also believes that "virtually all declarations by co-conspirators will be found to qualify as 'verbal acts,' and hence not hearsay in the first place, by analysis or rules definition." E. Cleary, *McCormick on Evidence* § 53, at 139 (3d ed. 1984).

[9] The current Rule 104(a) is identical in all material respects to the version of the rule that the Court submitted to Congress.

[10] In support of that view, the Court cited the remarks of Thayer, referring to the exclusionary rules of evidence as "the child of the jury system," inappropriate when the judge is deciding questions of admissibility. 415 U.S. at 175 n.12 (citation omitted).

the Court noted, "cohabitation out of wedlock would not seem to be a relationship that one would falsely confess." The Court pointed out that cohabitation out of wedlock was a crime in Wisconsin and that Mrs. Graff's statements were thus "against her penal interest" and "carried their own indicia of reliability." *Ibid.*

The *Matlock* case affirms the basic principle that the trial judge should be able to consider all relevant, non-privileged evidence in deciding admissibility questions. Moreover, the Court in *Matlock* identified the factors a trial judge should consider in deciding whether to rely on a particular statement, or other piece of evidence, in making an admissibility decision. Those factors include: (1) whether the trial judge is satisfied that the statement was made (415 U.S. at 175); (2) whether the statement is internally consistent (*id.* at 176); (3) whether the statement is corroborated by other evidence in the case (*ibid*); and (4) whether, in light of the declarant's penal interest (or like factor), the statement bears "indicia of reliability" (*ibid.*).

The same kind of analysis should govern a trial court's decision whether to rely on the truth of a purported co-conspirator statement in determining the admissibility of the statement. Hearsay statements of all kinds must, of course, be scrutinized with care to determine whether they are sufficiently probative for a court to accord them any weight in making the findings required by Rule 801(d)(2)(E). As the Court observed in *Matlock*, however, some hearsay is more probative than other, and a district court can be trusted to discount particular items of hearsay as the circumstances dictate.

Petitioner does not suggest that the bootstrapping rule precludes the trial court from considering *all* hearsay statements. Nor could he, since the bootstrapping rule, by its terms, forbids a court only from relying on the particular hearsay statement that the government is seeking to have admitted. Thus, petitioner concedes (Br. 32) that a

court could consider other hearsay, such as the statement of a third party, in determining whether the defendant and the declarant were members of the conspiracy. Presumably, the bootstrapping rule would not even foreclose the court from considering other hearsay statements of the same declarant, separate from the ones that the government is seeking to have admitted. Yet if that is so, it is difficult to discern any continuing purpose for the bootstrapping rule, since there is no reason to believe that other hearsay statements are inherently more reliable than the hearsay statement under consideration for admission.

Rather than adhering to the bootstrapping rule, which is supported more by metaphor than by logic, the Court should apply Rule 104(a) according to its plain language and treat the admission of co-conspirator declarations the same as the admission of any other kind of evidence. If, after assessing the co-conspirator statement, the trial court finds that the statement is reliable, the court should be permitted to rely on the statement, along with any other pertinent evidence, in deciding whether the requirements of Rule 801(d)(2)(E) have been met.

3. Petitioner acknowledges (Br. 26-27) that the plain terms of Rule 104(a) would appear to abolish the bootstrapping rule, and he concedes (Br. 25-26) that the court can consider the co-conspirator statement itself in determining whether the statement was made during and in furtherance of the conspiracy. He contends, however, that Rule 104(a) should not apply to the question of the existence of the conspiracy. This is so, he suggests (Br. 29-30), because the Rules of Evidence were intended to preserve the co-conspirator exception in its pre-rules form, including the traditional requirement that the finding that the defendant and the declarant were members of the same conspiracy had to be based on independent, non-hearsay evidence.

The answer to this contention is that the Rules of Evidence preserved the substance of the co-conspirator exception but changed the manner in which the rule is to be administered. Rule 801(d)(2)(E) still requires proof that the defendant and the declarant were members of the same conspiracy, and that the declaration was made during and in furtherance of the conspiracy. What was changed in the new rules was that it is now the court, not the jury, that makes these findings. And with that change, it follows that, as in the case of other evidentiary matters, the court is permitted to consider all relevant, nonpriviledged evidence bearing on the issue of admissibility.

Petitioner suggests (Br. 29) that to permit courts to consider the statements themselves in determining their admissibility will lead to the admission of more unreliable evidence. That is true in only one sense: any rule that restricts the kind of evidence that a court can consider in determining whether the proponent of evidence has met his burden will result in the admission of less evidence; a reduction in the amount of evidence that is admitted will, of course, mean a reduction in the amount of unreliable evidence that is admitted. But it is by no means clear that co-conspirator declarations are more unreliable as a class than other evidence that courts typically look to in determining the admissibility of such statements. Thus, a particular statement by an alleged co-conspirator may have the inescapable ring of truth and be overwhelmingly corroborated. Yet, as petitioner would have it, a court may not consider that statement in determining whether the declarant and the defendant were members of a conspiracy. On the other hand, according to petitioner, a court may consider, without restriction, much more equivocal physical evidence in determining the existence and nature of the conspiracy. It is hard to find a justification for a rule that can have the effect of distorting the

fact-finding process by excluding some of the most probative evidence and forcing the courts to look to evidence that may be less reliable.

The irrationality of the scheme proposed by petitioner is underscored by the facts of this case. Lonardo's statements that his "gentleman friend" was with him at the telephone and would be paying $15,000 for the cocaine were immediately corroborated by the words of the "gentleman friend" on the telephone, by Lonardo's actions at the time of the transaction, and by petitioner's conduct in the hotel parking lot, where he accepted the cocaine and was arrested in possession of just over $15,000 in cash. Moreover, Lonardo's statements, which were made in the course of arranging an imminent drug transaction, were highly likely to be accurate, since Lonardo had every incentive to ensure that the transaction went smoothly. Thus, Lonardo's statements during his conversations with Greathouse constituted compelling, well corroborated, and reliable evidence of the existence of a conspiracy between himself and petitioner. On the other hand, the "independent" evidence—obtained through surveillance and seized from petitioner following his arrest—while still strong evidence of the conspiracy, was not nearly as compelling as Lonardo's statements themselves. There is no reason that a court should be forced to ignore the powerful evidence provided by the statements themselves in favor of exclusive reliance on the less compelling "independent" evidence in making the findings on which the admission of the evidence depends.

Finally, petitioner argues (Br. 21-23) that the Court should retain the bootstrapping rule because that choice "will require only the smallest change in the approach of [the] * * * lower federal courts" (Br. 23). There are several answers to this claim. First, several of the courts of appeals have evidently adhered to the bootstrapping rule simply because they felt bound by this Court's decision in

Glasser, in the absence of a clear signal from this Court that the language in *Glasser* has not survived the adoption of Rule 104(a). See *United States* v. *James*, 590 F.2d at 581; *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Petrozziello*, 548 F.2d at 23 n.2. The acquiescence of lower courts in a prior decision of this Court should be entitled to no persuasive weight as a justification for the earlier rule.

Moreover, the "approach" of the circuit courts is not as clear-cut as petitioner suggests. The First and Sixth Circuits have held that Rule 104(a) overrules the bootstrapping rule. See, *e.g.*, *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States* v. *Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978). See also *United States* v. *Drougas*, 748 F.2d 8, 29 (1st Cir. 1984). The Second Circuit, while applying the bootstrapping rule, has intimated in recent decisions that Rule 104(a) may require a different result. See, *e.g.*, *United States* v. *DeJesus*, 806 F.2d 31, 34 (1986); *United States* v. *Cicale*, 691 F.2d 95, 103 n.3 (1982), cert. denied, 460 U.S. 1082 (1983). Two other circuits that observe the bootstrapping rule have noted, but not resolved, the apparent conflict between that rule and Rule 104(a). See *United States* v. *Jackson*, 627 F.2d 1198, 1215-1216 n.34 (D.C. Cir. 1980); *United States* v. *Santiago*, 582 F.2d 1128, 1133 n.11 (7th Cir. 1978).[11]

Only three circuits, as far as we can tell, have expressly held that Rule 104(a) does not overrule the bootstrapping rule, but none of the three has provided a convincing rationale for that conclusion. The Fifth Circuit adhered to the bootstrapping rule in *United States* v. *James*, *supra*, but it did so without offering a reason. See 590 F.2d at

[11] The Fourth and Tenth Circuits, which also apply the bootstrapping rule, see, *e.g.*, *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978), have apparently not addressed the impact of Rule 104(a).

581. We believe that the extensive and well-considered concurring opinion of Judge Tjoflat (*id.* at 584-594) has much the better of the argument. The Third Circuit reached the same result, on the ground that without a bootstrapping rule defendants would be exposed to "idle chatter" and "inadvertently misreported and deliberately fabricated evidence." *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 261 (citation omitted). The Eighth Circuit took the same position. It stated, without supporting analysis, that the bootstrapping rule is "an important safeguard." *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). This array of views hardly constitutes a uniform and persuasive line of lower court authority in favor of the rule. In sum, the lower court decisions, responding to the perceived compulsion of language in this Court's decision in *Glasser*, have accorded too little respect to the experience of trial judges and have contravened the considerable discretion intentionally given to trial courts under Rule 104(a).

4. If the Court agrees with petitioner that the bootstrapping rule should be retained, the Court should make clear that the rule applies only to the hearsay components of the co-conspirator declarations under consideration. When a co-conspirator statement is admissible on other grounds—either because it is not offered for its truth or because it falls within a separate hearsay exception or exemption—the bootstrapping rule does not apply. In the present case, nearly all of the co-conspirator statements offered against petitioner were admissible independent of Rule 801(d)(2)(E). The trial court was therefore correct in relying on those co-conspirator statements in deciding whether the remaining co-conspirator statements were admissible under Rule 801(d)(2)(E).

This Court considered a similar issue in *Anderson* v. *United States*, 417 U.S. 211 (1974). The *Anderson* case involved a prosecution for conspiracy to cast fictitious votes

in federal, state, and local elections. At trial, the government offered against all of the defendants certain out-of-court statements made by two of the defendants. Petitioners argued that the statements did not fall within the co-conspirator exception since, in their view, the conspiracy had ended before the statements were made. Rejecting that contention, the Court held that because the statements were not hearsay in the first place, there was no need to decide whether the requirements of the co-conspirator exception had been met. The Court observed that the prerequisites of the co-conspirator exception are only of concern where "the declaration would otherwise be hearsay." 417 U.S. at 219.

In *Anderson,* co-conspirator statements, admissible as nonhearsay, were used as evidence of the conspiracy charged in the indictment. There is no reason to take a different view when the inquiry is whether there is sufficient proof of the existence and membership of a conspiracy to warrant a finding of admissibility under Rule 801(d)(2)(E). Where a co-conspirator statement is admissible on some basis other than Rule 801(d)(2)(E) itself, a trial court should not shrink from using that statement to support a finding that the prerequisites of Rule 801(d)(2)(E) have been satisfied.

This principle has been widely recognized by the courts of appeals. In finding sufficient "independent" evidence of the conspiracy, courts have relied, for example, on co-conspirator statements that they found admissible as non-assertions and therefore not "statements" under Rule 801(a) (see, *e.g., United States* v. *Perez*, 658 F.2d 654, 659 (9th Cir. 1981)); co-conspirator statements that constituted adoptive admissions under Rule 801(d)(2)(B) (see, *e.g., United States* v. *Andrus*, 775 F.2d 825, 839-840 (7th Cir. 1985); *United States* v. *Carter*, 760 F.2d 1568, 1579-1581 (11th Cir. 1985)); co-conspirator statements that were admissible as declarations against penal interest

under Rule 804(b)(3) (see, *e.g., United States* v. *Dekle*, 768 F.2d 1257, 1262 (11th Cir. 1985)); and co-conspirator statements that were admissible as "state of mind" evidence under Rule 803(3) (see, *e.g., United States* v. *De-Jesus*, 806 F.2d 31, 35 (2d Cir. 1986); *United States* v. *Cicale*, 691 F.2d 95, 104 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983)).

Co-conspirator statements often consist of warnings or orders from one conspirator to another. Statements of this sort are admissible not because of the truth of the matter asserted, but because the fact that they were made tends to prove the existence and membership of the conspiracy. Courts have routinely relied on co-conspirator statements of this kind in upholding findings under Rule 801(d)(2)(E). See, *e.g., United States* v. *Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984) (in concluding that the prerequisites of Rule 801(d)(2)(E) were met, court relied, in part, on orders given by one co-conspirator to another; held, "[a]n order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth"); *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976) (instructions given by one confederate to another were "verbal acts" and thus could be relied on in making a Rule 801(d)(2)(E) finding). See also *United States* v. *Miller*, 771 F.2d 1219, 1233 (9th Cir. 1985); *United States* v. *Tuchow*, 768 F.2d 855, 868 (7th Cir. 1985); *United States* v. *Gibson*, 675 F.2d 825, 834 (6th Cir.), cert. denied, 459 U.S. 972 (1982).[12]

In the present case, the government relied on several co-conspirator statements in arguing that there was sufficient proof of the existence and membership of the conspiracy.

[12] In some cases, the simple fact that a co-conspirator statement was made tends, without more, to show a connection between the declarant and the defendant and is thus evidence of the existence and membership of the conspiracy. See, *e.g., United States* v. *Lopez*, 584 F.2d 1175, 1179 (2d Cir. 1978), cert. denied, No. 84-6993 (Jan. 13, 1986).

First, the government cited (Tr. 984) Lonardo's May 12 statement that he would "try to contact some people" but that he did not want his contacts to know who he was dealing with. Lonardo's expression of his intention to contact other persons was admissible under Rule 803(3) as evidence of his state of mind. Lonardo's statement that he did not want his contacts to know who he was dealing with is not hearsay at all: the mere fact that he made that statement tends to prove that a secret operation was afoot.

The government relied next (Tr. 985) on Lonardo's direction to Greathouse about where to deliver the cocaine. That was an order and thus not a hearsay declaration at all. The government also noted (*ibid.*) that Lonardo and Greathouse reached an agreement on price. Once again, it was the fact of agreement that was relevant to prove the existence of the conspiracy, and that fact was not hearsay. Finally, the government relied (Tr. 985-986) on Lonardo's May 24 and 25 instructions to Greathouse that (1) the deal would not take place at the Sheraton Hotel but rather would be consummated at the Hilton; (2) that once Greathouse arrived in the lobby he was to give Lonardo his car keys; and (3) that Lonardo's "friend" would be out in his car and Lonardo would "just go over and, you know" (Tr. 986). Those statements were admissible both as state of mind evidence and as directions whose admissibility did not turn on the truth of any of the contents of the statements.

The only arguably hearsay statement relied on by the government in supporting the Rule 801(d)(2)(E) finding was Lonardo's May 25 statement in which he reported to Greathouse that his "friend" was with him and had some questions to ask about the "trees" (Tr. 985-986). If the bootstrapping rule is retained, that statement would not be available to support a finding under Rule 801(d)(2)(E). But in light of the other evidence in the case—both the remaining co-conspirator statements that were independently admissible and the non-hearsay evidence of petitioner's activities in the Hilton parking lot before and during the cocaine transaction—the trial court's determination (Tr. 989) that there was proof by a preponderance of the evidence that a conspiracy existed and that Lonardo and petitioner were members of it could not possibly be regarded as clearly erroneous.[13] Thus, even if the Court is persuaded that the bootstrapping rule should be retained, the trial court's ruling that the requirements of Rule 801(d)(2)(E) were met should be affirmed.

II. THE "PREPONDERANCE OF THE EVIDENCE" STANDARD SHOULD APPLY TO A COURT'S FINDINGS ON THE ADMISSIBILITY OF CO-CONSPIRATOR DECLARATIONS

We agree with petitioner that the findings made by a court in determining whether to admit evidence under Rule 801(d)(2)(E) should be subject to the preponderance of the evidence standard.

In the closely related context of suppression motions, this Court has held that the preponderance standard is the correct standard for determining the admissibility of evidence. In *Lego* v. *Twomey*, 404 U.S. 477 (1972), a plurality of the Court held that the preponderance standard should govern the question whether a defendant's confession was voluntary and thus admissible at trial. The Court observed (404 U.S. at 488) that from its "experi-

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[13] Like any other factual finding, a trial court's determination that the requirements of Rule 801(d)(2)(E) have been satisfied is reviewable under the clearly erroneous standard. See, *e.g.*, *United States* v. *Andrus*, 775 F.2d at 840; *United States* v. *Lopez*, 758 F.2d 1517, 1520 (11th Cir. 1985), cert. denied, No. 84-6993 (Jan. 13, 1986); *United States* v. *Singer*, 732 F.2d 631, 636 (8th Cir. 1984); *United States* v. *Winship*, 724 F.2d 1116, 1122 (5th Cir. 1984); *United States* v. *Arruda*, 715 F.2d 671, 684 (1st Cir. 1983); *United States* v. *Romano*, 684 F. 2d 1057, 1066 (2d Cir.), cert. denied, 459 U.S. 1016 (1982); see also *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

ence over [a] period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence." The Court could find "nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." *Ibid.*

The Court has since held that the preponderance standard applies to determinations of the sufficiency of a consent to search (*Matlock*, 415 U.S. at 177-178 n.14), to the question whether evidence would have inevitably been discovered (*Nix* v. *Williams,* 467 U.S. 431, 444 & n.5 (1984)), and, most recently, to determinations of the sufficiency of a waiver of *Miranda* rights (*Colorado* v. *Connelly,* No. 85-660 (Dec. 10, 1986), slip op. 9-11). See also *United States* v. *Raddatz,* 447 U.S. 667, 678 & n.5 (1980).

There is no reason no apply a different standard to the admissibility of co-conspirator declarations. As in the suppression context, there is no suggestion "that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard" (*Lego,* 404 U.S. at 488). Moreover, the defendant is amply protected at trial from the admission of possibly unreliable evidence by the rigorous standard of proof beyond a reasonable doubt that the government must satisfy in order to obtain a conviction. See *United States* v. *Jackson,* 627 F.2d 1198, 1219 (D.C. Cir. 1980); *United States* v. *Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978).

The preponderance standard has been adopted by the great majority of lower courts.[14] The only courts that have

[14] See *United States* v. *Chindawongse,* 771 F.2d 840, 844 (4th Cir. 1985), cert. denied, No. 85-5862 (Jan. 21, 1986); *United States* v. *Dougas,* 748 F.2d 8, 28 (1st Cir. 1984); *United States* v. *DeJesus,* 806 F.2d 31, 34 (2d Cir. 1986); *United States* v. *Ammar,* 714 F.2d 238, 249-251 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *James,* 590 F.2d 575, 582-583 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Vinson,* 606 F.2d 149, 152 (6th Cir.),

suggested a different standard have adopted an apparently less exacting one—either "substantial" evidence or evidence sufficient to take a case to a jury.[15] Those lower standards, like the "bootstrapping rule," are vestiges from the time prior to the adoption of the Federal Rules of Evidence, when juries were given final responsibility for ruling on the admissibility of co-conspirator declarations. Those standards are therefore inconsistent with the current system in which the court has the exclusive responsibility for determining the admissibility of co-conspirator statements after making the preliminary findings required by Rule 801(d)(2)(E). See *United States* v. *Petrozziello,* 548 F.2d at 22-23. For that reason, the district court in this case was correct in applying the "preponderance" test that is employed in most circuits.

III. THE CONFRONTATION CLAUSE DOES NOT REQUIRE AN INDEPENDENT ASSESSMENT OF THE RELIABILITY OF A CO-CONSPIRATOR DECLARATION

The final question presented in this case is whether, after finding a co-conspirator declaration to be admissible under Rule 801(d)(2)(E), a court must conduct a separate inquiry to determine if the statement carries with it sufficient indicia of reliability to satisfy the Confrontation Clause. We submit that such an inquiry should not be re-

cert. denied, 444 U.S. 1074 (1980); *United States* v. *Jefferson,* 714 F.2d 689, 696 (7th Cir. 1983); *Bell,* 573 F.2d at 1044; *United States* v. *Andrews,* 585 F.2d 961, 965 (10th Cir. 1978). The preponderance standard is, moreover, applied by all circuits in civil cases.

[15] See, *e.g., United States* v. *Jackson,* 627 F.2d 1198, 1219 (D.C. Cir. 1980) (substantial evidence); *United States* v. *Weiner,* 578 F.2d 757, 768 (9th Cir.), cert. denied, 439 U.S. 981 (1978) ("sufficient * * * evidence to establish a prima facie case").

quired, because a statement that is admissible under the traditional co-conspirator rule is sufficiently reliable to satisfy Confrontation Clause concerns.[16]

A. Because The Co-Conspirator Rule Is A "Firmly Rooted Hearsay Exception," Statements Admitted Under The Rule Satisfy The Confrontation Clause

In *Ohio* v. *Roberts,* 448 U.S. 56 (1980), this Court recognized (448 U.S. at 65-66) that out-of-court statements offered at trial ordinarily must be shown to be reliable in order to satisfy the Confrontation Clause. The Court noted, however, that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' " (*id.* at 66, quoting *Mattox* v. *United States,* 156 U.S. 237, 244 (1895)). In a case where the evidence falls within a "firmly rooted hearsay exception," the Court held, "[r]eliability can be inferred without more" (448 U.S. at 66).

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[16] The circuits are divided on this issue. Some courts have held that the Confrontation Clause requires a separate "reliability" inquiry. See *United States* v. *Gomez,* No. 84-1555 (10th Cir. Jan. 30, 1987), slip op. 12; *United States* v. *DeLuna,* 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez,* 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar,* 714 F.2d 238, 254-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright,* 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). Other circuits have held that a statement admissible under Rule 801(d)(2)(E) satisfies the Confrontation Clause without the need for a separate inquiry into the reliability of the statement. See, *e.g., United States* v. *Chindawongse,* 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-5862 (Jan. 21, 1986); *United States* v. *Kendall,* 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock,* 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *McManus,* 560 F.2d 747 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *Ottomano* v. *United States,* 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973).

The Court in *Roberts* identified two reasons to justify this categorical approach to the reliability of statements admissible under "firmly rooted" hearsay exceptions. First, the hearsay rules and the Confrontation Clause stem from the same historical roots and were designed to promote similar values. 448 U.S. at 66. As the Court put the matter in *Salinger* v. *United States,* 272 U.S. 542, 548 (1926), "[t]he right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of [the Confrontation Clause] * * * is to continue and preserve that right, and not to broaden it or disturb the exceptions." Second, the categorical approach "responds to the need for certainty in the workaday world of conducting criminal trials." *Roberts,* 448 U.S. at 66. Trial courts and litigants, who work with the rules of evidence on a daily basis, depend on "certainty and consistency in the application of the Confrontation Clause." *Id.* at 73 n.12.

The categorical approach outlined in *Roberts* is appropriate for co-conspirator declarations, because the co-conspirator rule is a "firmly rooted" exception to the rule against hearsay. As we discussed at length in our brief in *United States* v. *Inadi,* No. 84-1580 (Mar. 10, 1986), the rule allowing the admission of co-conspirator declarations had already emerged in England at the time of the adoption of the Sixth Amendment.[17] In this country, the co-conspirator rule was adopted by the Supreme Court of New Jersey in 1791, the very year in which the Bill of

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[17] See *Trial of Daniel Dammaree,* 15 State Tr. 522 (1710); *Trial of Lord George Gordon,* 21 State Tr. 522, 526-527, 529-540 (1781); *Trial of Thomas Hardy,* 24 State Tr. 200, 454 (1794); *Trial of John Horne Tooke,* 25 State Tr. 1 (1794); *Trial of William Stone,* 25 State Tr. 1155, 1277-1278 (1794). See Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378, 1383 & n.29 (1972). We have furnished petitioner with a copy of our brief in *Inadi.*

Rights was ratified. *Patton* v. *Freeman,* 1 N.J.L. 113, 115 (1791). Similar decisions were soon handed down by the highest courts of Vermont, Virginia, and Pennsylvania. *Broughton* v. *Ward,* 1 Tyl. 137, 139 (Vt. 1801); *Claytor* v. *Anthony,* 27 Va. (6 Rand.) 285, 300-301 (1828); *Reitenbach* v. *Reitenbach,* 1 Rawle 362, 365 (Pa. 1829).

This Court first recognized the co-conspirator exception more than a century and a half ago in *American Fur Co.* v. *United States,* 27 U.S. (2 Pet.) 358, 364-365 (1829). Since then, the Court has repeatedly reaffirmed it.[18] Rule 801(d)(2)(E), which was proposed by this Court and adopted without change, codifies the co-conspirator rule in precisely the form recognized at common law and in the earliest evidence treatises. See, *e.g.,* 1 S. Greenleaf, *A Treatise on the Law of Evidence* § 184 a, at 304-306 (16th ed. 1899); 2 F. Wharton, *Wharton's Evidence in Criminal Cases* § 699, at 1183 (11th ed. 1935). See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,* 53 Fordham L. Rev. 1291, 1297 n.39 (1985). Moreover, almost every state has adopted the co-conspirator rule, either by statute or caselaw, in a form essentially the same as the common-law rule and Rule 801(d)(2)(E).[19]

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[18] See, *e.g., United States* v. *Nixon,* 418 U.S. 683, 701 (1974); *Anderson* v. *United States,* 417 U.S. 211, 218 (1974); *Wong Sun* v. *United States,* 371 U.S. 471, 490 (1963); *Lutwak* v. *United States,* 344 U.S. 604, 617-618 (1953); *Krulewitch* v. *United States,* 336 U.S. 440, 443 (1949) (describing the co-conspirator rule as "firmly established"); *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942); *Wiborg* v. *United States,* 163 U.S. 632, 657-658 (1896); *Logan* v. *United States,* 144 U.S. 263, 308-309 (1892); *Nudd* v. *Burrows,* 91 U.S. 426, 438 (1875).

[19] Twenty-six states have rules of evidence identical to Rule 801(d)(2)(E): Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Minnesota, Mississippi, Montana, Nebraska (Neb. Rev. Stat. § 27-801(4)(b)(v) (1985)), Nevada (Nev. Rev. Stat. Ann. § 51.035(3)(e) (1967)), New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma (Okla. Stat. Ann. tit. 12, § 2801(4)(b)(5) (1980)), Oregon (Ore. R. Evid. 801(4)(b)(E) (1984)), South Dakota (S.D. Codified Laws Ann. § 19-16-3(5) (1979)), Texas (Tex. R. Evid. 801(e)(2)(E) (1985)), Utah, Vermont, Washington, West Virginia, Wisconsin (Wis. Stat. Ann. § 908.01(4)(b)(5) (1975)), and Wyoming. Nine states have rules of evidence similar to Rule 801(d)(2)(E): California (Cal. Evid. Code § 1223 (West 1966)), Delaware, Florida (Fla. Stat. Ann. § 90.803(18) (West 1979)), Kansas (Kan. Stat. Ann.§ 60-460(i)(2) (1983)), Louisiana (La. Rev. Stat. tit. 15, § 455 (1981)), Maine, Michigan, New Jersey (N.J. R. Evid. 63(9)(b)), and Ohio. Fourteen states have adopted the co-conspirator exception by court decision. See, *e.g., Leonard* v. *State,* 459 So.2d 970, 972 (Ala. Crim. App. 1984); *State* v. *Tropiano,* 158 Conn. 412, 423, 262 A.2d 147, 152 (1969), cert. denied, 398 U.S. 949 (1970); *People* v. *Goodman,* 81 Ill. 2d 278, 283, 408 N.E.2d 215, 216 (1980); *Wallace* v. *State,* 426 N.E.2d 34, 42-43 (Ind. 1981); *Napier* v. *Commonwealth,* 515 S.W.2d 615, 616 (Ky. 1974); *Thomas* v. *State,* 492 A.2d 939 (Md. App. 1985); *Commonwealth* v. *Bongarzone,* 390 Mass. 326, 340, 455 N.E.2d 1183, 1192, (1983); *State* v. *Cornman,* 695 S.W.2d 443, 447 (Mo. 1985); *People* v. *Sanders,* 56 N.Y. 2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982); *Commonwealth* v. *Dreibelbis,* 493 Pa. 466, 475, 426 A.2d 1111, 1115 (1981); *State* v. *Bracero,* 434 A.2d 286, 289 (R.I. 1981); *State* v. *Sullivan,* 277 S.C. 35, 42, 282 S.E.2d 838, 842 (1981); *State* v. *Thomas,* 691 S.W.2d 571, 572 (Tenn. Crim. App. 1985); *Anderson* v. *Commonwealth,* 215 Va. 21, 24, 205 S.E.2d 393, 395 (1974). Georgia has adopted the co-conspirator rule by statute (Ga. Code Ann. § 24-3-5 (1982), but the Georgia courts have construed that state's rule more broadly than the common law and federal rule. See *Dutton* v. *Evans,* 400 U.S. 74 (1970).

The Court's cases dealing with the co-conspirator exception confirm that—consistent with the categorical approach outlined in *Roberts*—there is no warrant for subjecting admissible co-conspirator declarations to further scrutiny under the Confrontation Clause. None of the many cases dealing with the co-conspirator exception has suggested that evidence admissible under that exception may nonetheless fail to satisfy the requirements of the Sixth Amendment. In fact, in the one instance in which such a confrontation claim was made, the Court readily dismissed it. In *Delaney* v. *United States,* 263 U.S. 586

(1924), a defendant challenged the admission of a co-conspirator statement, in part on Confrontation Clause grounds. The Court acknowledged that some hearsay may run afoul of the right to confrontation (263 U.S. at 590).[20] But co-conspirator statements, the Court held, are "competent and within the ruling of the cases" when they are made "during the progress of the conspiracy." (*ibid*).

More recently, in *United States* v. *Inadi, supra,* the Court applied the categorical approach to a claim that the Confrontation Clause requires the government either to produce the co-conspirator declarant or to show that he is unavailable. Concluding that the benefits of such a rule would be slight and the burdens substantial, the Court declined to require a showing of the declarant's unavailability as a prerequisite to the admission of co-conspirator declarations in any case, even though live testimony from the declarant might be valuable in particular instances. *Inadi,* slip op. 11-12.

This Court's decision in *Dutton* v. *Evans,* 400 U.S. 74 (1970), does not undermine the categorical approach or support the proposition that a separate reliability inquiry is necessary in cases involving co-conspirator declarations. In *Dutton,* the Court considered a statement that had been admitted under a novel variant of the traditional co-conspirator rule. The state co-conspirator exception at issue in *Dutton* permitted the admission of a statement made by a conspirator after the conspiracy had ended. The plurality upheld the admission of the statement after determining that it bore "indicia of reliability" (*id.* at 89)

[20] For this proposition, the Court relied principally on *Diaz* v. *United States,* 223 U.S. 442, 450 (1912), involving prior testimony, and *Spiller* v. *Atchison, Topeka & Santa Fe Ry.,* 253 U.S. 117, 130 (1920), involving statements of various third parties gathered and summarized by a single witness at trial.

and that the defendants could not have benefited significantly from cross-examining the declarant (*ibid.*).[21]

The plurality in *Dutton* was at pains to point out that its careful scrutiny of the co-conspirator statement in that case was triggered by the unusual nature of the state's hearsay rule. The plurality opinion made it clear that it did not mean to "require a constitutional reassessment of every established hearsay exception" (400 U.S. at 80); in fact, the Court specifically noted that it was not "question[ing] the validity of the co-conspirator exception applied in the federal courts" (*ibid.*).

Petitioner seeks to minimize the degree of his disagreement with this analysis by acknowledging (Br. 35) that evidence that meets the requirements of Rule 801(d)(2)(E) should ordinarily satisfy the Confrontation Clause as well. He contends, however, that there may be "unusual cases" (Br. 37) in which a court should conduct a separate reliability inquiry.[22] Those "unusual cases," petitioner suggests, will be "those in which a defendant specifically ob-

[21] Justice Harlan concurred in the result in *Dutton* on the ground that the Confrontation Clause was not applicable at all. 400 U.S. at 93-97. In the course of his opinion, Justice Harlan made it clear that he did not approve of interpreting the Confrontation Clause in a manner that would render it "a threat to much of the existing law of evidence and to future developments in that field" (*id.* at 94).

[22] Petitioner tempers even this limited concession by insisting that a reliability inquiry is unnecessary only if the Court retains the rule against "bootstrapping" (Br. 31 n.38, 35). But there is no justification for this qualification. Under Rule 104(a), the district court will rely on the co-conspirator declarations to support its finding of conspiracy only if it finds those statements to be reliable. Thus, if the court finds that the co-conspirator declarations are not trustworthy, the court will not rely on them in making its admissibility ruling. In that event, the abandonment of the bootstrapping rule will not affect the case. On the other hand, if the court decides to rely on the declarations because they are especially trustworthy under all the circumstances, there will be no need for a separate (and redundant) reliability inquiry under the Confrontation Clause.

jects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable" (Br. 36).

Contrary to petitioner's prognosis, we doubt that such claims would be rare. As long as there is some prospect of excluding damaging evidence on Confrontation Clause grounds, defense counsel will have an incentive to press reliability claims in virtually every case. And there will be many such cases, since "[t]he co-conspirator rule apparently is the most frequently used exception to the hearsay rule" (*Inadi*, slip op. 11). If the Court is to employ the categorical approach and minimize the burden of litigation over the Confrontation Clause issue, it will not be well served by a rule purporting to limit Confrontation Clause claims to some loosely defined class of "rare cases."

B. The Requirements Of The Co-conspirator Rule Afford Substantial Guarantees Of Reliability

Apart from the status of the co-conspirator rule as a firmly rooted hearsay exception, the prerequisites to admissibility in Rule 801(d)(2)(E) help ensure that evidence admitted under the rule is reliable. For that reason as well, there is no need for an independent inquiry into the reliability of each statement that is introduced as a co-conspirator declaration. See S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 728 (4th ed. 1986).

1. The requirement that a co-conspirator declaration be made during the conspiracy and in furtherance of its goals supports the reliability of the declaration in several ways. First, when conspirators are working toward a common goal, the reliability of their statements in furtherance of that goal is enhanced. Experience suggests that declarants who are reacting to, planning, or carrying out significant events in the operation of a conspiracy are unlikely to misreport those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d 897,

910-911 & n.3 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir. 1985), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 238, 256-257 & n.16 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d at 37-38. Moreover, because the statements must be made during the life of the conspiracy, they are unlikely to be the product of faulty recollection. *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d at 38.

Second, as the Court observed in *Dutton* v. *Evans*, 400 U.S. at 88-89, statements made in furtherance of an illegal enterprise are inherently against the declarant's penal interest, which further decreases the likelihood that the statements will be false or mistaken. Accord *Lee*, slip op. 4-5 (Blackmun, J., dissenting). See also *United States* v. *Pagan*, 721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, the "in furtherance" requirement has the effect of screening out idle chatter, as well as inadvertently misreported and deliberately fabricated statements, since those statements do not advance the goals of the conspiracy. For that reason as well, the rule itself helps guarantee the reliability of the statements admitted under its authority. See 4 J. Weinstein & M. Berger, *supra*, ¶ 801(D)(2)(E)[01]. See also *Krulewitch* v. *United States*, 336 U.S. 440, 443-444 (1949); *United States* v. *Fahey*, 769 F.2d 829, 838-839 (1st Cir. 1985); *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir. 1961).

Fourth, the requirement that the declarant and the defendant be shown to be co-conspirators makes it more likely that the declarant will be well aware of the defendant's role in the enterprise and his efforts to ensure its

success. See *Dutton* v. *Evans,* 400 U.S. at 88-89. Again, this factor reduces the risk that the information contained in the statement will be false.

Finally, because co-conspirator declarations, to be admissible, must be made in the course of the conspiracy, they are in some respects even more reliable than in-court testimony. This Court made that point in *Inadi,* where it explained that statements made while the conspiracy is in progress "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court" (*Inadi,* slip op. 7). For example, when the government offers the statement of one drug dealer to another in furtherance of an illegal conspiracy (*ibid.*)

> the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

For that reason, the Court noted, co-conspirator declarations "are usually irreplaceable as substantive evidence" (*id.* at 8).

Because the requirements of Rule 801(d)(2)(E) typically ensure the reliability of admissible co-conspirator statements, it is not surprising that, to our knowledge, no court of appeals has ever held that a statement otherwise admissible under the co-conspirator exemption was too unreliable to submit to the jury. See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,* 53 Fordham L. Rev. 1291, 1315-1316 (1985). Indeed, the courts that insist on performing a separate

reliability test rely on factors that duplicate, to a large extent, the inquiry already required by Rule 801(d)(2)(E) to admit a co-conspirator statement.

For example, some courts have found indicia of reliability in the fact that the declarant made the statements to other members of the conspiracy. See, *e.g.*, *United States* v. *DeLuna,* 763 F.2d 897, 910-911 & n.3 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Ammar,* 714 F.2d 238, 257 n.16 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Fleishman,* 684 F.2d 1329, 1340 (9th Cir.), cert. denied, 459 U.S. 1044 (1982). That factor, however, largely duplicates the requirements that the declarant and defendant be part of the same conspiracy and that the statement be made during the life of the conspiracy. Other courts have found reliability in the fact that the statements are "part of an on-going transaction." *United States* v. *Arbelaez,* 719 F.2d 1453, 1460 (9th Cir. 1983). That factor likewise duplicates the pendency requirement. The search for corroborating evidence, which some courts find to be the best guarantee of reliability (see, *e.g.*, *Ammar,* 714 F.2d at 256-257; *Fleishman,* 684 F.2d at 1340), largely duplicates the trial court's obligation under Rule 801(d)(2)(E) to determine whether the evidence establishes the prerequisites for admissibility.

2. In considering whether the requirements of Rule 801(d)(2)(E) are constitutionally inadequate and must be supplemented with a reliability analysis, it is important to note that besides being the product of a long common-law heritage, the co-conspirator rule is the product of a intensive deliberative process that culminated in the adoption of the Federal Rules of Evidence. That process involved both the rulemaking authority of this Court and the legislative power of Congress. The hearsay exceptions that

emerged from this process were forged with full consideration of the requirements of reliability imposed by the Confrontation Clause.

When it was developing the proposed Federal Rules of Evidence, the Advisory Committee carefully considered whether each of the hearsay exceptions possessed sufficient "guarantees of trustworthiness." Fed. R. Evid. art. VIII advisory committee note, 46 F.R.D. 161, 325 (1969). The scheme was then reviewed, revised, and adopted by this Court. 56 F.R.D. 183 (1972). After receiving the rules from this Court, "Congress extensively reviewed [the Court's] submission, and considerably revised it" (*United States* v. *Abel,* 469 U.S. at 49). See Pub. L. No. 93-595, § 1, 88 Stat. 1926.

Most of the changes made by Congress in the proposed rules were designed to augment the reliability of evidence admitted at trial. For example, Congress amended the hearsay exception for records of regularly conducted activities, codified in Rule 803(6), to provide "further assurance of * * * trustworthiness." H.R. Rep. 93-650, 93d Cong., 1st Sess. (1973). Changes designed to ensure reliability were also made in the proposed rules governing prior inconsistent statements (Rule 801(d)(1)(A)), see Report of the Committe on the Judiciary, H.R. Rep. 93-650, *supra,* at 13; dying declarations (Rule 804(b)(2)), see H.R. Rep. 93-650, *supra*; and declarations against interest (Rule 804(b)(3)), see *ibid.*

Although Congress was clearly sensitive to the issue of reliability, it enacted Rule 801(d)(2)(E) in precisely the form in which this Court promulgated it. 56 F.R.D. 183, 293 (1972). Indeed, from the Preliminary Draft of The Proposed Rules of Evidence submitted by the Advisory Committee of the Judicial Conference in March 1969 (see 46 F.R.D. 161, 331 (1969); Rule 801(c)(3)(v)), through the final version of the Rules submitted by this Court to Con-

gress and passed by Congress in 1975, Pub. L. No. 93-595, Art. VIII, 88 Stat. 1938, the co-conspirator exception remained unchanged. This was not an oversight. After the House adopted the co-conspirator rule in the form promulgated by the Court, Senator McClellan proposed that the "in furtherance" requirement be deleted and in its place two new requirements be added: (1) that there be independent circumstantial guarantees of trustworthiness; and (2) that the statement be relevant to the character or the execution of the conspiracy itself. *Rules of Evidence (Supplement), Hearings on the Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary,* 93d Cong., lst Sess. 56, 58, 59 (1973). Congress refused to enact these changes.[23] See *United States* v. *Harris,* 546 F.2d 234, 237 & n.4 (8th Cir. 1976). In view of Congress's close attention to reliability concerns when it was considering the Rules of Evidence, this Court should not lightly conclude that Rule 801(d)(2)(E) is inconsistent in many of its applications with the requirements of the Confrontation Clause. See *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981); see also *Walters* v. *National Ass'n of Radiation Survivors,* No. 84-571 (June 28, 1985), slip op. 13; *Schweiker* v. *McClure,* 456 U.S. 188 (1982).

3. We do not contend that Rule 801(d)(2)(E) guarantees that each co-conspirator statement submitted to the jury will be entirely trustworthy; no class of evidence can meet that standard. But to the extent that Rule 801(d)(2)(E) fails to assure complete reliability, any shortfall should affect only the weight of the evidence, not its admissibility. To require the trial judge to apply an

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[23] Similar, and equally unsuccessful, efforts to change the requirements of the co-conspirator rule had been directed to the Advisory Committee. See E. Cleary, *McCormick's Evidence* § 267, at 793 (3d ed. 1984).

exacting standard of reliability to otherwise admissible co-conspirator statements would allocate to the judge a responsibility that is properly reserved for the jury. See *Watkins* v. *Sowders,* 449 U.S. 341, 347 (1981); *Manson* v. *Brathwaite,* 432 U.S. 98, 113 n.14 (1977). As this Court noted in *Barefoot* v. *Estelle,* 463 U.S. 880, 898 (1983), "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder." A constitutional claim that otherwise admissible evidence should be kept from the jury solely on reliability grounds, the Court said, "is founded on the premise that a jury will not be able to separate the wheat from the chaff" (463 U.S. at 901 n.7). The Court added that it did not "share in this low evaluation of the adversary process" (*ibid.*).

The contention that the district court should screen co-conspirator declarations for reliability also ignores the procedures available to a defendant to challenge co-conspirator statements that he believes to be unreliable. Fed. R. Evid. 806 permits a defendant to attack the credibility of a hearsay declarant, including the maker of a co-conspirator declaration, with any evidence that would have been admissible if the declarant had testified as a witness. Thus, the defendant may offer specific instances of conduct under Fed. R. Evid. 608(b), evidence of prior convictions under Fed. R. Evid. 609, and prior inconsistent statements under Fed. R. Evid. 613 to impeach the credibility of the declarant.[24] Evidence of the declarant's

[24] See, *e.g., United States* v. *Noble,* 754 F.2d 1324, 1330-1332 (7th Cir. 1985) (prior convictions); *United States* v. *Coachman,* 727 F.2d 1293, 1297 n.13 (D.C. Cir. 1984) (same); *United States* v. *Bovain,* 708 F.2d 606, 613 (11th Cir.), cert. denied, 464 U.S. 898 (1983) (same); *United States* v. *Pizarro,* 717 F.2d 336, 350 (7th Cir. 1983), cert. denied, 471 U.S. 1139 (1985), (inconsistent statements); *United States* v. *Wuagneux,* 683 F.2d 1343, 1357 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) (same); *United States* v. *Nardi,* 633 F.2d 972, 976 (1st Cir. 1980) (same).

bias or inability to perceive or recall is also admissible. See *United States* v. *Abel,* 469 U.S. 45, 50-51 (1984). And, of course, the defendant is always free to argue to the jury that the declarant is unworthy of belief.

For these reasons, we submit that the requirements of Rule 801(d)(2)(E) ensure that declarations admitted under the rule are sufficiently reliable to satisfy the Confrontation Clause. To require a more exacting review by the trial court would have the effect of denying to the jury its primary responsibility for weighing all the evidence in the case and rejecting that portion of the evidence that the jury finds untrustworthy.

4. Finally, a rule requiring a separate reliability inquiry in each case would impose substantial burdens on the criminal justice system without serving the Confrontation Clause's "mission [of] advanc[ing] 'the accuracy of the truth-determining process in criminal trials' " *Tennessee* v. *Street,* 471 U.S. 409, 415 (1985) (quoting *Dutton* v. *Evans,* 400 U.S. at 89). It is important to bear in mind that federal conspiracy cases do not always involve the small number of co-conspirator statements that were offered in this case. The trial of a large-scale organized crime or narcotics conspiracy may involve dozens of co-conspirators, and the prosecution may propose to offer hundreds of co-conspirator statements. In such cases, a "reliability review" would impose an unjustifiable cost on the criminal justice system by increasing the time and expense of litigating conspiracy cases at the trial level. In addition, it would "add[] another avenue of appellate review in these complex cases" (*Inadi,* slip op. 11). That burden would be magnified because the reliability test, as applied by the courts of appeals that require it, involves the consideration of a wide range of factors, some rather open-ended. See, *e.g., Ammar,* 714 F.2d at 256; *United States* v. *Perez,* 658 F.2d 654, 661 (9th Cir. 1981); *DeLuna,* 763 F.2d at 910; *Fleishman,* 684 F.2d at 1339.

If the costs of such a procedure were offset by real and substantial gains to the fairness and reliability of the criminal trial, it might be justified. In fact, however, the rule is almost all cost and no benefit. In those circuits in which defendants now have the benefit of the rule, district and appellate courts have expended substantial energy in weighing the reliability of co-conspirator declarations, yet no court of appeals has ever held that evidence admitted under Rule 801(d)(2)(E) was too unreliable to satisfy the Confrontation Clause. We cannot imagine a justification for an evidentiary rule that is so difficult to administer, but which, in practice, has so little apparent impact on the evidence admitted at trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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